

STATE OF MICHIGAN  
COURT OF APPEALS

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JENNIFER LYNN TYLUTKI,

Plaintiff-Appellant,

v

RICK J. AYLESWORTH,

Defendant-Appellee.

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UNPUBLISHED  
December 18, 2012

No. 310842  
Jackson Circuit Court  
LC No. 08-002527-DS

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's June 1, 2012, order denying her motion for change of domicile of the parties' minor child from Michigan to Florida.<sup>1</sup> We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant had one minor child together, born in 2007. Plaintiff and defendant lived together for approximately one year after the birth of their child, a girl, and ended their relationship shortly before her first birthday. Plaintiff obtained a judgment of support and sole legal and physical custody of the child in 2008. In 2009, plaintiff began seeking

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<sup>1</sup> We note briefly the basis for this Court's jurisdiction over this appeal. MCR 7.203(A)(1) provides that this Court has jurisdiction over appeals from "[a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6)." A "final order" includes "in a domestic relations action, a postjudgment order affecting the custody of a minor." MCR 7.202(6)(a)(iii). We conclude that the order appealed from in the instant case was such a final order. An order on a motion to change domicile is one "affecting the custody of a minor." *Thurston v Escamilla*, 469 Mich 1009; 677 NW2d 28 (2004). A trial court's order denying a petition for change of custody also is "an order affecting custody." *Wardell v Hincka*, 297 Mich App 127; \_\_\_ NW2d \_\_\_ (2012), slip op at 2. Here, in addition to denying plaintiff's motion to change domicile, the June 1, 2012, order also denied defendant's motion for change of custody, although defendant has not appealed the denial of that motion. Each of those aspects of the trial court's ruling "necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor." *Id.*

to move with the minor child to Florida. Plaintiff and defendant eventually entered in a written stipulation in September of 2009, allowing plaintiff to change the minor child's domicile. In October of 2009, plaintiff, who lived in Michigan, obtained a change of domicile order and moved the child to Florida. In 2011, defendant moved to vacate the change of domicile order, alleging that plaintiff had obtained the order by committing fraud on the court. After an evidentiary hearing, the trial court vacated the 2009 change of domicile order and ordered plaintiff to return to Michigan with the child, after finding that plaintiff had committed a fraud upon the court by allowing it to enter the change of domicile order despite the fact that plaintiff knew that certain facts upon which the order was premised were not (or were no longer) true. The trial court also granted joint legal custody of the child to defendant. Ultimately, plaintiff returned to Michigan with the child in December of 2011.

In February of 2012, after living with the child in Michigan for two months, plaintiff filed a second motion for change of domicile. After weighing the factors enunciated in MCL 722.31(4), the trial court denied plaintiff's motion. Plaintiff contends that the trial court's findings were against the great weight of the evidence. For the reasons stated below, we disagree.

## II. STANDARD OF REVIEW

We review the trial court's findings of fact in a child custody case under the great weight of the evidence standard. *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). "In accord with that standard, this Court will sustain the trial court's factual findings unless the evidence clearly preponderates in the opposite direction." *Id.* (quotation marks and citation omitted). Additionally, "[w]e review for an abuse of discretion the family court's decision to allow a parent to remove a child from the state." *Spires v Bergman*, 276 Mich App 432, 436; 741 NW2d 523 (2007). In the context of child custody proceedings, "[a]n abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic . . . ." *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; 811 NW2d 501 (2011) (quotation marks and citation omitted).

## III. GUIDING LEGAL PRINCIPLES

The parties shared joint legal custody of the child, as they do now, when plaintiff filed her motion for change of domicile in February 2012. "When the parents share joint custody and one parent is seeking permission to relocate more than 100 miles away, the family court must consider the factors of MCL 722.31(4)." *Spires*, 276 Mich App at 436-437. MCL 722.31(4) provides that

[b]efore permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
- (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the

parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

“The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted.” *McKimmy v Melling*, 291 Mich App 577, 582; 805 NW2d 615 (2011).

#### IV. MCL 722.31(4)(a)

With regard to MCL 722.31(4)(a), the trial court found that moving to Florida would improve plaintiff's quality of life, as she had a strong desire to move away from defendant and she preferred living in Florida. However, MCL 722.31(4)(a) requires the trial court to consider not just whether the parent's quality of life will improve, but also to consider “[w]hether the legal residence change has the capacity to improve the quality of life *for both the child and the relocating parent*.” (Emphasis added). Moreover, under MCL 722.31(4), the trial court is to consider the factors “with the child as the primary focus . . .” Here, the trial court found that moving to Florida would not improve the child's quality of life. In doing so, the trial court noted various advantages plaintiff alleged that Florida provided for the child, but determined that “it's just as good in Michigan for [the child] as it is in Florida.” In reaching this conclusion, the trial court noted the presence of the child's extended family and siblings in Michigan. The proximity of relatives can improve a child's quality of life. *Rittershaus v Rittershaus*, 273 Mich App 462, 466-467; 730 NW2d 262 (2007).

In reaching its conclusion on MCL 722.31(4)(a), the trial court considered and rejected plaintiff's testimony that living in Florida provided her with financial advantages that improved the child's life. For instance, plaintiff testified that she was employed as a certified nursing assistant (“CNA”) in Florida and she was unable to find a comparable CNA job in Michigan. She also testified that her rent was less expensive in Florida because she could live in her father's vacation home at a reduced monthly rate. We have held that a parent's increased earning capacity can improve a child's quality of life. *Id.* at 466. Nonetheless, in this case, the trial court's finding that the child's quality of life would not be improved in spite of plaintiff's claims was not against the great weight of the evidence. With regard to her testimony concerning her employment and her inability to find a comparable job in Michigan, the trial court found that

plaintiff's testimony lacked credibility. It found that because plaintiff did not want to remain in Michigan, she "didn't necessarily try extremely hard to get a job in Michigan because she, first of all, doesn't want to stay here, and secondly, wasn't sure if she was staying here." "[T]his Court must defer to the trial court on issues of credibility." *Gagnon v Glowacki*, 295 Mich App 557, 568; 815 NW2d 141 (2012). Additionally, as to plaintiff's reduced monthly rent in Florida, the trial court pointed out that plaintiff, who had several relatives and friends in Michigan, could likely live with one of them and pay a reduced rate of rent similarly to the way she lived in her father's vacation home in Florida. Moreover, the record revealed that plaintiff lived with her ex-step-mother-in-law, Debra Zeller, when she stayed in Michigan. Accordingly, the trial court's finding that living in Florida would not provide plaintiff and the child with a financial advantage and thus would not improve the child's quality of life was not against the great weight of the evidence.

Plaintiff also argues that the child received superior medical care in Florida because her doctors were more aggressive in treating her medical conditions. She also testified that the child's health improved while she lived in Florida. The trial court noted plaintiff's testimony concerning the child's doctors in Florida as well as the child's health conditions, but concluded that plaintiff did not demonstrate that living in Florida had the capacity to improve the child's quality of life. With regard to whether the child's health improved in Florida, the trial court again questioned plaintiff's credibility. Despite claiming that the child's health improved while she lived in Florida, plaintiff also testified concerning a number of ailments and afflictions from which the child suffered while she lived in Florida. This Court should not interfere with the trial court's assessment of plaintiff's credibility. *Gagnon*, 295 Mich App at 568. With regard to whether the child's doctors in Florida were superior because they were more aggressive in their treatment of the child's health issues, the trial court noted that the child's health issues were more advanced in Florida than they were in Michigan, thereby necessitating more intensive treatment. The trial court thus concluded that plaintiff failed to establish that the child received superior medical care in Florida. The trial court's findings that living in Florida did not improve the child's health, and that living in Florida would not improve the child's quality of life, were not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

Finally, plaintiff contends that the trial court's findings on this factor were against the great weight of the evidence because she and the child lived in Florida from 2009 to 2011, and she alleges that there was proof the child's quality of life actually improved during that time period. Thus, she argues that this case is different from an ordinary change of domicile case where the trial court is left to speculate as to whether a change of domicile would benefit the moving parent and the minor child because she alleges that the child's quality of life already improved from living in Florida. However, contrary to plaintiff's contention, the trial court considered plaintiff's evidence and the effect that living in Florida had on plaintiff's and the child's quality of life. The trial court found that some of plaintiff's testimony concerning the improvements Florida offered was not credible. The trial court also rejected the remainder of plaintiff's testimony, and found that for the child, the evidence demonstrated that living in Florida was "probably an equal situation" compared to living in Michigan. For the reasons discussed above, that finding was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323.

#### V. MCL 722.31(4)(b)

The trial court found that MCL 722.31(4)(b) was the “biggest factor” in the case before it. It found that both parties failed to comply with court orders governing parenting time, and that defendant failed to utilize all of his parenting time, particularly because he had almost no parenting time with the child from October of 2009 to August of 2011. Further, the trial court found that plaintiff’s plan to move the child to Florida was designed to frustrate defendant’s parenting time.

Plaintiff contends that the trial court’s failure to weigh this factor in her favor was against the great weight of the evidence. She refers this Court to several instances where defendant failed to comply with parenting time orders and failed to exercise his parenting time with the child. The trial court considered evidence of defendant’s failures to exercise all of his available parenting time, and found that he was responsible for most of his failures. The trial court found that defendant’s failures were not dispositive on this factor because some of defendant’s difficulties in exercising parenting time were attributable to plaintiff’s failure to help facilitate parenting time while she lived in Florida.

As for plaintiff, the trial court found that she was motivated by a desire to frustrate defendant’s parenting time. In reaching this conclusion, the trial court noted that plaintiff accused defendant of physically and sexually abusing the child in August of 2011, after she returned to Florida with the child following a week where defendant had parenting time with the child. After viewing photographs of bruises the child received during that time period, the trial court determined that the bruises “appear[ed] to be nothing more than what typically is going to happen to any kid of that age that’s playing outside or with toys or even remotely roughly.” The trial court also found that plaintiff lacked credibility when she accused defendant of sexually abusing the child. Moreover, it found that plaintiff had a strong desire to move to Florida, and that her allegations of abuse may have been motivated by her desire to remain in Florida. The trial court’s findings were not against the great weight of the evidence. The record reveals that plaintiff preferred living in Florida and that she had no desire to live in Michigan. Moreover, as to the trial court’s determination that plaintiff’s allegations of abuse were not credible, this Court defers to the trial court’s credibility assessment. *Gagnon*, 295 Mich App at 568.

Because the trial court found that plaintiff’s allegations of abuse lacked credibility, that plaintiff did not make the allegations of abuse against defendant until after she learned that she would be ordered to move back to Michigan,<sup>2</sup> and that she had a strong motivation to return to

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<sup>2</sup> Plaintiff testified that she first contacted Florida’s Department of Child and Family Services on August 20, 2011, eleven days before the trial court formally issued its order vacating the prior order granting plaintiff’s change of domicile (to Florida) and granting defendant joint legal custody. However, plaintiff had been informed at a June 22, 2011 hearing that the prior order would be vacated and that she would have to bring a motion to change the child’s domicile if she wished to keep the child in Florida. Plaintiff did not allege abuse against defendant until after defendant’s first week of parenting time concluded on August 18, 2011 and plaintiff had returned to Florida with the child.

Florida, the trial court's finding that plaintiff desired to frustrate defendant's parenting time was not against the great weight of the evidence. See *Shulick*, 273 Mich App at 323. Moreover, the trial court's finding that plaintiff was motivated by a desire to frustrate defendant's parenting time was not against the great weight of the evidence in light of defendant's testimony that plaintiff attempted to manipulate the child in such a manner that she would not enjoy spending time with defendant.

#### VI. MCL 722.31(4)(c)

Regarding MCL 722.31(4)(c), the trial court found, based on the parties' history, that it had "no faith that parenting time orders will be followed should the Court allow this move back to Florida." This finding was not against the great weight of the evidence. The record reveals that both parties failed to comply with parenting time orders. For instance, defendant was late to a parenting time exchange and he failed to exercise all of his available parenting time. Moreover, when plaintiff lived in Florida, defendant rarely exercised parenting time, and when he tried to do so, he failed to comply with the trial court's order that required him to give plaintiff 30 days notice of his intent to visit the child.

Additionally, when plaintiff lived in Florida, defendant testified that she failed to comply with the court-ordered parenting time schedule that was in effect because she failed to inform him when she returned to Michigan with the child. Furthermore, plaintiff failed to comply with a court order that required her to return the child to Michigan after her 2009 change of domicile was revoked, and she was held in contempt of court for her failure to do so. Plaintiff attempted to refute defendant's testimony that she did not comply with the court-ordered parenting time schedule when she lived in Florida, but the trial court found that plaintiff's testimony was not credible. It found that "to some degree both parties really failed in this regard," relative to compliance with court-ordered parenting time schedules. Consequently, because there was evidence that both parties failed to comply with parenting time schedules throughout this case, and that their failures were amplified when plaintiff lived in Florida, the trial court's finding that the parties were unlikely to comply with parenting time orders if plaintiff was permitted to move was not against the great weight of the evidence.

#### VII. MCL 722.31(4)(d)

Regarding MCL 722.31(4)(d), whether the parent opposing the legal residence change was motivated by a desire to secure a financial advantage with regard to a support obligation, the trial court found that the factor was not applicable as defendant consistently paid child support. Plaintiff does not dispute the trial court's findings on this factor and there is no reason to disturb the trial court's finding.

#### VIII. MCL 722.31(4)(e)

With regard to the final factor, MCL 722.31(4)(e), domestic violence, the trial court noted that both parties accused the other of domestic violence, and found that the factor did not favor either party. Plaintiff contends that the trial court's failure to find that this factor weighed in her favor was against the great weight of the evidence. However, defendant testified that plaintiff committed domestic violence against him. Moreover, while plaintiff testified to

numerous instances of domestic violence by defendant, the trial court found that some of plaintiff's allegations lacked credibility. This Court will not disturb the trial court's credibility assessments. *Gagnon*, 295 Mich App at 568. Consequently, because both sides accused the other of domestic violence, the trial court's findings that both plaintiff and defendant committed domestic violence against the other, and that MCL 722.31(4)(e) did not weigh in favor of either party, was not against the great weight of the evidence.

On this factor, plaintiff also challenges the trial court's finding that it could prevent future domestic violence between the parties with an appropriate parenting time schedule. She notes her testimony wherein she alleged that defendant stalked her as recently as three days before the first evidentiary hearing on her motion for change of domicile. However, the trial court expressly referenced plaintiff's testimony regarding the alleged stalking incident and noted that "it appears that that [stalking incident] was not something that could necessarily be established . . . ." Because this Court defers to the trial court's credibility determinations, the trial court's finding that plaintiff's allegations were not credible, and that a future custody agreement could help prevent future domestic violence between plaintiff and defendant, was not against the great weight of the evidence. *Gagnon*, 295 Mich App at 568.

#### IX. DISPOSITIONAL RULING

In summary, we conclude that the trial court's findings under the factors enumerated in MCL 722.31(4) were not against the great weight of the evidence. Consequently, we find that plaintiff failed to meet her burden of establishing, by a preponderance of the evidence, that moving the child to Florida was warranted. *Melling*, 291 Mich App at 582. Because plaintiff failed to satisfy her burden of proof, the trial court's decision to deny her motion for change of domicile was "not so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Brown v Loveman*, 260 Mich App 576, 604; 680 NW2d 432 (2004).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Stephen L. Borrello  
/s/ Mark T. Boonstra